Selva Vinayagam a/l Sures v Timbalan Menteri Dalam Negeri, Malaysia & Ors

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05(HC)-270–11 OF 2019(B)
ABANG ISKANDAR CJ (SABAH AND SARAWAK), ZAWAWI SALLEH, VERNON ONG, ZALEHA YUSOF AND ZABARIAH MOHD FCJJ
11 DECEMBER 2020

Criminal Law — Dangerous Drugs (Special Preventive Measures) Act 1985 ('DDSPMA') — s 6(1) — Whether pre-requisite to detaining person under s 6(1) of DDSPMA was that he/she had (or would have) acted in association with a substantial body of persons in an activity related to trafficking in dangerous drugs — Whether a person who had or would have acted alone in such an activity could not be detained under s 6(1) — Whether preamble of DDSPMA incorporating words used in art 149 of Federal Constitution and forming part of the purpose and object of the DDSPMA confined ambit and scope of scrutiny of the Act explicitly to dangerous drugs trafficking activities prejudicial to public order that were carried out by 'a substantial body of persons

The applicant ('appellant') was detained for two years at the second respondent's rehabilitation centre pursuant to a detention order made by the first respondent ('R1') under s 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the DDSPMA'). Under that section, the Minister was authorised to make the order if he was satisfied that the person to be detained had been or was associated with any activity relating to trafficking in dangerous drugs and that it was necessary in the interest of public order that he/she be detained. The appellant attempted to set aside the detention order and obtain his release on the ground there had been non-compliance with a procedural requirement under the DDSPMA but the High Court rejected the attempt. In his instant appeal against that decision, the appellant raised a new point altogether, namely, that the detention order was ultra vires art 149 of the Federal Constitution ('the FC') and the DDSPMA (which was enacted pursuant to art 149). The appellant pointed out that the grounds of the detention order, the allegations of fact therein and R1's affidavit all showed that he had acted alone and not in association with 'a substantial body of persons' and, therefore, his detention under s 6(1) of the DDSPMA was unlawful. The appellant submitted that a detention under s 6(1) would only be lawful if the detainee was shown to have acted in concert with a substantial body of persons in an activity related to dangerous drugs trafficking. This was because the preamble to the DDSPMA — which s 15 of the Interpretation Acts 1948 and 1967 construed to be a significant part of the Act — stated that it was an Act to stop action prejudicial to public order that had been taken or was being

threatened by 'a substantial body of persons'. Those operative words were taken from art 149 of the FC which provided that if an Act of Parliament recited that action prejudicial to public order in Malaysia had been taken or was threatened by any substantial body of persons [in any one or more of the cases mentioned in art 149(1)(a) to (1)(f), any provision of that Act designed to stop or prevent that action was valid notwithstanding that it would be inconsistent with the fundamental rights and liberties contained in arts 5, 9, 10 or 13 of the FC. The appellant argued that the ambit and scope of scrutiny of the DDSPMA therefore did not apply to action taken or threatened by a single person not acting in association with any substantial body of persons. In reply, the respondents argued that: (a) the preamble of the DDSPMA could not be used to restrict or limit the meaning and effect of s 6(1) of the DDSPMA which was clear and unambiguous and that the aid of the preamble should only be resorted to if there was ambiguity in construing any operative part of the Act; (b) trafficking in dangerous drugs invariably involved other persons and, in keeping with the purpose and object of the DDSPMA, it was imperative that the applicant be detained so that he did not commit further crime; and (c) s 11C of the DDSPMA provided that a detention order could only be challenged on the ground of non-compliance with any procedural requirement, and nothing else.

Held, unanimously setting aside the detention order for being ultra vires art 149 of the FC and the DDSPMA and ordering the appellant to be forthwith released from detention:

(1) The preamble to the DDSPMA adopted the wordings of cl (1) and (1)(f) of art 149 of the FC in stating that 'action has been taken ... and is being threatened by a substantial body of persons ... which is prejudicial to public order'. Section 15 of the Interpretation Acts 1948 and 1967 provided that the long title and preamble to an Act shall be construed and have effect as part of the Act. And s 17A of the Interpretation Acts provided that in interpreting a provision of an Act, due regard must be had to the purpose or object of the Act (see paras 36–39).

(2) The phrase 'a substantial body of persons' referred to a large number of individuals acting in concert or working together for a common purpose. In the context of the DDSPMA, that phrase referred to action which was prejudicial to public order which had been taken or was being threatened by a large number of individuals acting together in the trafficking of dangerous drugs (see para 44).

(3) In the instant case, the grounds of the detention order, the allegations of fact and the first respondent's affidavit revealed that the appellant had acted alone and not in association with a substantial body of persons in the trafficking of dangerous drugs. As such, he could not come within the

ambit and scope of scrutiny of the DDSPMA whose scope was explicitly confined to a substantial body of persons (see paras 48 & 50).

(4) Although s 6(1) of the DDSPMA significantly omitted to refer to the involvement of 'a substantial body of persons' in relation to the public order element, the scope was clearly stated in the preamble as 'action which is prejudicial to public order ... has been taken ... by a substantial body of persons ...'. In the light of ss 15 and 17A of the Interpretation Acts, the purpose and object of the DDSPMA should be read into s 6(1) to give it the meaning Parliament intended when it enacted the Act pursuant to art 149 of the FC. This was particularly important as art 149 justified substantial restrictions on fundamental liberties. To construe s 6(1) without reading into it the purpose of the Act would: (a) render the declared purpose and object which was spelt out in the long title and preamble as mere verbiage; and (b) render otiose the provisions of ss 15 and 17 of the Interpretation Acts (see paras 45–46).

(5) The power under s 6(1) of the DDSPMA could only be exercised if three key ingredients were set out in the grounds of the detention order and allegations of fact, namely: (a) the activity which had been taken or was being threatened by a substantial body of persons related to or involved the trafficking in dangerous drugs; (b) the person to be detained was a member of a substantial body of persons; and (c) the Minister was satisfied that it was necessary in the interest of public order that the person concerned be subjected to preventive detention. The omission to set out all the three vital ingredients in the instant case indicated that the first respondent's mind was not applied to the question of the appellant's preventive detention. There was a failure to comply strictly with the letter of the rule of law. Consequently, the first respondent's exercise of power in the circumstances of this case was bad in law. The detention order was a nullity for being ultra vires art 149 and the DDSPMA (see paras 47 & 50–51).

[Bahasa Malaysia summary

Pemohon ('perayu') telah ditahan selama dua tahun di pusat pemulihan responden kedua berikutan perintah tanahan yang dibuat oleh responden pertama ('R1') di bawah s 6(1) Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1985 ('ADBLPK'). Di bawah seksyen tersebut, Menteri diberi kuasa untuk membuat perintah jika beliau berpuas hati bahawa orang yang ditahan itu pernah atau dikaitkan dengan apa-apa aktiviti berkaitan pengedaran dadah berbahaya dan bahawa ia adalah perlu demi kepentingan awam perintah tersebut dia ditahan. Perayu telah cuba mengetepikan perintah tahanan itu dan telah memperoleh pembebasannya atas alasan terdapat ketidakpatuhan dengan keperluan prosedur di bawah ADBLPK tetapi Mahkamah Tinggi telah menolak percubaan tersebut. Dalam rayuannya ini terhadap keputusan tersebut, perayu telah menimbulkan satu perkara baru

sama sekali, iaitu, bahawa perintah tahanan itu adalah ultra vires perkara 149 Perlembagaan Persekutuan ('PP') dan ADBLPK (yang digubal menurut perkara 149). Perayu menunjukkan bahawa alasan untuk perintah tahanan, pengataan berhubung fakta yang berkenaan dan afidavit R1 kesemuanya menunjukkan bahawa dia telah bertindak sendiri dan tidak bersekutu dengan 'a substantial body of persons' dan, oleh itu penahanannya di bawah s 6(1) ADBPLK adalah tidak sah. Perayu berhujah bahawa suatu penahanan di bawah s 6(1) hanya sah jika orang yang ditahan itu ditunjukkan telah bertindak bersama dengan sebilangan besar orang dalam suatu aktiviti yang berkaitan dengan pengedaran dadah berbahaya. Ini adalah kerana mukadimah ADBPLK — yang mana s 15 Akta Tafsiran 1948 dan 1967 mentafsirkan sebagai satu bahagian penting Akta tersebut — menyatakan bahawa ia adalah suatu Akta untuk menghentikan tindakan prejudis terhadap ketenteraman awam yang telah diragut atau terancam oleh 'a substantial body of persons'. Kata-kata operatif tersebut diambil daripada perkara 149 PP yang memperuntukkan bahawa jika suatu Akta Parlimen memetik bahawa tindakan yang prejudis kepada ketenteraman awam di Malaysia telah diragut atau terancam oleh mana-mana sebilangan besar orang dalam mana-mana salah satu atau lebih kes yang disebut dalam perkara 149(1)(a) hingga (1)(f), mana-mana peruntukan Akta tersebut yang digubal untuk menghentikan atau menghalang tindakan tersebut adalah sah walau apa pun bahawa ia akan tidak konsisten dengan hak asasi dan kebebasan yang terkandung dalam perkara-perkara 5, 9, 10 atau 13 PP. Perayu berhujah bahawa bidang kuasa dan skop penelitian ADBPLK dengan itu tidak terpakai terhadap tindkan yang diambil atau diancam oleh seseorang yang tidak bertindak bersama dengan mana-mana sebilangan besar orang. Dalam jawapan, responden-responden berhujah bahawa: (a) mukadimah ADBPLK tidak boleh digunakan untuk menghadkan atau membataskan maksud dan kesan s 6(1) ADBPLK yang mana adalah jelas dan tidak taksa dan bahawa mukadimah itu patut hanya digunakan untuk membantu jika terdapat ketaksaan dalam mentafsirkan mana-mana bahagian operatif Akta tersebut; (b) mengedar dadah berbahaya selalunya melibatkan orang lain dan, dalam mengekalkan tujuan dan objektif ADBPLK, ia adalah penting agar pemohon ditahan supaya dia tidak melakukan jenayah lain; dan (c) s 11C ADBPLK memperuntukkan bahawa perintahtahanan hanya boleh dicabar atas alasan ketidakpatuhan dengan apa-apa keperluan prosedur, dan tidak ada yang lain.

Diputuskan, sebulat suara mengetepikan perintah tahanan kerana ultra vires perkara 149 PP dan ADBPLK serta memerintahkan perayu dibebaskan daripada tahanan:

(1) Mukadimah ADBPLK menggunapakai kata-kata daripada klausa (1) dan (1)(f) perkara 149 PP untuk menyatakan bahawa 'action has been taken ... and is being threatened by a substantial body of persons...which is prejudicial to public order'. Seksyen 15 Akta Tafsiran 1948 dan 1967

memperuntukkan bahawa tajuk Panjang dan mukadimah suatu Akta hendaklah ditafsirkan dan mempunyai kesan sebagai sebahagian Akta itu. Dan s 17A Akta Tafsiran memperuntukkan bahawa dalam mentafsirkan suatu peruntukan untuk suatu Akta, perlu diber perhatian kepada tujuan atau objektif Akta itu (lihat perenggan 36–39).

(2) Frasa 'a substantial body of persons' merujuk kepada sebilangan besat individu yang bertindak Bersama atau bekerja Bersama untuk tujuan yang sama. Dalam konteks ADBPLK, frasa tersebut merujuk kepada tindakan yang bersifat prejudis kepada ketenteraman awam yang telah diambil atau terancam oleh sebilangan besar individu yang bertindak bertindak bersama mengedar dadah berbahaya (lihat perenggan 44).

(3) Dalam kes ini, alasan perintah tahan, pengataan fakta dan afidavit responden pertama menunjukkan bahawa perayu bertindak sendiri dan tidak dikaitkan dengan sebilangan besar orang dalam pengedaran dadah berbahaya itu. Oleh demikian, dia tidak terjatuh di bawah bidang kuasa dan skop penelitian ADBPLK yangmana skopnya jelas terhad kepada sebilangan besar orang (lihat perenggan 48 & 50).

(4) Walaupun s 6(1) ADBPLK jelas tertinggal untuk menrujuk kepada penglibatan 'a substantial body of persons' berkaitan elemen ketenteraman awam, skop itu jelas menyatakan dalam mukadimah sebagai 'action which is prejudicial to public order ... has been taken ... by a substantial body of persons ...'. Berdasarkan ss 15 dan 17A Akta Tafsiran, tujuan dan objektif SDBPLK hendaklah dibaca dengan s 6(1) untuk memberikan maksud yang diniatkan oleh Parlimen semasa ia menggubal Akta tersebut menurut perkara 149 PP. Ini khususnya penting kerana perkara 149 mewajarkan sekatan substantial terhadap kebebasan asasi. Untuk mentafsirkan s 6(1) tanpa membacanya dengan tujuan Akta tersebut akan: (a) menjadikan tujuan dan objektif yang diisytiharkan sepertian dinyatakan dalam tajuk panjang dan mukadimah sebagai kata-kata semata-mata; dan (b) menjadikan ss 15 dan 17 Akta Tafsiran tidak berguna (lihat perenggan 45–46).

(5) Kuasa di bawah s 6(1) ADBPLK hanya boleh digunakan jika tiga elemen utama dinyatakan dalam alasan perintah tahanan dan pengataan fakta, iaitu: (a) aktiviti yang telah diambil atau diancam oleh sebilangan besar orang yang berkait atau terlibat dengan pengedaran dadah berbahaya; (b) orang yang ditahan merupakan ahli kepada sebilangan besar orang itu; dan (c) Menteri berpuas hati bahawa ia adalah perlu demi kepentingan ketenteraman awam bahawa orang berkenaan tertakluk penahanan pencegahan. Peninggalan untuk menyatakan kesemua tiga elemen penting dalam kes ini menunjukkan bahawa minda responden pertama tidak digunakan untuk soalan berhubung penahanan pencegahan perayu. Terdapat kegagalan untuk mematuhi dengan tegas rukun undang-undang. Berikutan itu, pelaksanaan kuasa responden

pertama dalam keadaan kes ini adalah tidak baik dari segi undang-undang. Perintah penahanan itu adalah terbatal kerana ultra vires perkara 149 dan ADBPLK (lihat perenggan 47 & 50–51).] A

Cases referred to

Ahmad Yani bin Ismail v Inspector General of Police [2005] 4 MLJ 636, HC (overd) B

Application of Tan Boon Liat & Ors Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors; Patrick Eugene Long v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors; Donnie Lee Avila v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors, Re [1977] 2 MLJ 18, FC (refd) C

Application of Tan Boon Liat @ Allen Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors, Re [1976] 2 MLJ 83 (distd)

Johnson Tan Ham Seng v PP & other appeals [1977] 2 MLJ 66, FC (not folld)

Lee Kew Sang v Timbalan Menteri Dalam Negeri & Ors [2005] 2 MLJ 631; [2005] 3 CLJ 914, HC (refd) D

Mohd Najib bin Yusof v Timbalan Menteri Dalam Negeri, Malaysia & Anor [2016] MLJU 1853; [2016] 1 MLRHU 1, HC (refd)

Nik Nazmi bin Nik Ahmad v PP [2014] 4 MLJ 157; [2014] 4 CLJ 944, CA (refd) E

PP v Yuneswaran a/l Ramaraj [2015] 6 MLJ 47; [2015] 9 CLJ 873, CA (distd)

Raja Petra bin Raja Kamarudin v Menteri Hal Ehwal Dalam Negeri, Malaysia [2008] MLJU 1095; [2008] 8 MLRH 666, HC (refd)

Datuk James Wong Kim Min; Minister of Home Affairs, Malaysia & Ors, Re [1976] 2 MLJ 245; [1976] MLRA 132, FC (refd) F

Teh Cheng Poh v PP [1979] 1 MLJ 50; [1978] 1 LNS 202, PC (refd)

Theresa Lim Chin Chin & Ors v Inspector General of Police [1988] 1 MLJ 293, SC (refd)

Legislation referred to G

Criminal Procedure Code s 374

Dangerous Drugs (Special Preventive Measures) Act 1985 ss 1, 4, 4(1), 6(1), 7, 8, 9(1), (2)(a), (3), 10, 11, 11C, 12

Federal Constitution arts 5, 5(1), 6, 7, 8, 9, 9(3), 10, 10(2)(a), (2)(b), (2)(c), 11, 12, 13, 13(1), 149, 149(1), (1)(a), (1)(b), (1)(c), (1)(d), (1)(e), (1)(f), 151(1) H

Interpretation Acts 1948 and 1967 ss 15, 17, 17A

Peaceful Assembly Act 2012 ss 9(1), (5)

Najib bin Zakaria (Najib Zakaria, Hisham & Co) for the appellant. I

Muhammad bin Sinti (Senior Federal Counsel, Attorney General's Chambers) for the respondent.

Vernon Ong FCJ:

INTRODUCTION

[1] On 22 November 2018, a detention order pursuant to s 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('Act 316') was issued by the Deputy Minister of Home Affairs directing that the appellant be detained for a period of two years with effect from 22 November 2018 at the Pusat Pemulihan Akhlak, Simpang Renggam, Johor. Section 6(1) authorises the Minister to make such order if he is satisfied that such person has been or is associated with any activity relating to the trafficking in dangerous drugs and that it is necessary in the interest of public order that such person be detained.

[2] The appellant filed an application at the High Court on 27 May 2019 for a writ of habeas corpus on the ground that the detention order was unlawful.

[3] At the High Court, the appellant's sole ground was that the respondent failed and/or refused to produce the appellant's statement which was recorded by the investigating police officer ('IPO') pursuant to s 4 of Act 316. This failure and or refusal to produce the appellant's statement, submitted learned counsel for the appellant, amounted to a substantive procedural non-compliance which justified the writ of habeas corpus to be issued.

[4] Suffice it to state that the learned judge dismissed the appellant's application on the grounds that: (a) the IPO had carried a proper investigation and examination of the appellant under s 4(1) of Act 316; and (b) the non-production of the appellant's statement did not breach any procedural requirement under Act 316. As the High Court's decision is in respect of a habeas corpus application, this appeal was brought directly to the Federal Court without leave pursuant to s 374 of the Criminal Procedure Code.

THE APPELLANT'S SUBMISSION

[5] Before us, learned counsel for the appellant raised a new point — that the detention order and the grounds and allegations of fact thereunder are ultra vires art 149 of the Federal Constitution ('the FC') and the Preamble of Act 316.

[6] At the heart of the appellants' argument is that the grounds of the detention order, the allegations of fact and the Deputy Minister's affidavit revealed that the appellant is acting alone without any participation from any other persons; it did not allege that the appellant's activities were being conducted in association with a substantial body of persons.

[7] The preamble to Act 316 states that it is an Act to stop action which is prejudicial to public order which has been taken or threatened by 'a substantial body of persons'. Act 316 is consonant with art 149 of the FC which provides that an Act of Parliament which recites that 'action has been taken or threatened by any substantial body of persons' is valid even though it is inconsistent with any of the provisions of arts 5, 9, 10 or 13 of the FC. As s 15 of the Interpretation Acts 1948 and 1967 ('the Interpretation Acts') provides that the short title, the long title and the preamble to Act 316 should be construed as part of Act 316, the activities of a single person cannot be deemed to be within the ambit and scope of scrutiny under the preventive legislations such as Act 316. As such, it was argued that the ambit or scope of Act 316 is only confined to a substantial body of persons (*Raja Petra bin Raja Kamarudin v Menteri Hal Ehwal Dalam Negeri, Malaysia* [2008] MLJU 1095; [2008] 8 MLRH 666).

[8] It is therefore necessary to scrutinise the grounds and allegations of fact to ascertain whether the Deputy Minister had taken into account the factor that the appellant has been carrying out the impugned acts in association with a substantial group of persons (*Mohd Najib bin Yusof v Timbalan Menteri Dalam Negeri, Malaysia & Anor* [2016] MLJU 1853; [2016] 1 MLRHU 1). A scrutiny will show that it is not the respondent's case that the appellant was a member of a substantial body of persons involved in trafficking in dangerous drugs.

THE RESPONDENT'S SUBMISSION IN REPLY

[9] Learned senior federal counsel ('SFC') appearing for the respondent argued that the preamble to Act 316 is not an operating part of the statute. The aid of the preamble is only to be taken when there is some doubt about the meaning of the operative part of the statute. Where the enacting part is explicit and unambiguous the preamble cannot be resorted to, to control, qualify or restrict it. The enacting words of the statute are not always to be limited by the words of the preamble and must in many instances go beyond it, and when they do so, they cannot be cut down by reference to it. Therefore, the preamble to Act 316 is not relevant for the purposes of construction or considering the scope of the provisions of s 6(1) as there is no ambiguity whatsoever in the latter (*Re Application of Tan Boon Liat @ Allen Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [1976] 2 MLJ 83, *Re Application of Tan Boon Liat & Ors Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors; Patrick Eugene Long v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors; Donnie Lee Avila v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [1977] 2 MLJ 18 (FC); *Johnson Tan Ham Seng v Public Prosecutor & Other Appeals* [1977] 2 MLJ 66 (FC); *Ahmad Yani bin Ismail v Inspector General of Police & Ors* [2005] 4 MLJ 636 (HC)). Section 17A of the Interpretation Acts only enjoins a court to interpret a provision of an Act that would promote the

purpose or object underlying the Act (*Public Prosecutor v Yuneswaran a/l Ramaraj* [2015] 6 MLJ 47; [2015] 9 CLJ 873 (CA)).

[10] It was also submitted that the appellant's argument is inconsistent with the broad and practical approach that the court has taken to see the scheme of the legislation both under the FC and Act 316 — to stop actions which is prejudicial to public order (*Theresa Lim Chin Chin & Ors v Inspector General of Police* [1988] 1 MLJ 293). Pursuant to art 149 of the FC, Act 316 confers powers on the Executive to act in a manner inconsistent with arts 5, 9, 10 or 13 of the FC (*Teh Cheng Poh v Public Prosecutor* [1979] 1 MLJ 50; [1978] 1 LNS 202). Whilst conceding that there is nothing in the grounds or allegations of fact to say that a substantial body or persons is involved, SFC argued that the court should take judicial notice that trafficking in dangerous drugs invariably involves other persons.

[11] At any rate, the preamble is merely a guide as to the object of Act 316. Section 6(1) can be invoked once the Minister is satisfied that: (a) the appellant has been or is associated with any activity involving the trafficking in dangerous drugs; and (b) that it is necessary in the interest of public order that the appellant be detained. There is no requirement to show that there is a threat from a substantial body of persons involved in the activity (*Ahmad Yani bin Ismail v Inspector General of Police & Ors* [2005] 4 MLJ 636).

[12] Lastly, SFC argued that pursuant to s 11C of Act 316 the detention order may only be challenged on ground of non-compliance with any procedural requirement, and nothing else (*Lee Kew Sang v Timbalan Menteri Dalam Negeri & Ors* [2005] 2 MLJ 631; [2005] 3 CLJ 914).

DECISION

[13] In essence, the appellant's argument is that the Deputy Minister failed to consider whether the appellant was carrying out the activities alone or in association with 'a substantial body of persons'. That the detention is only justified and lawful on the basis that the appellant was alleged to have been acting in concert or in association with a substantial body of persons — which allegation was absent on the record.

[14] This argument relates to the question of whether the long title and preamble to Act 316 should be construed and have effect in the interpretation of sub-s 6(1).

Short title, long title and preamble to an act

[15] As a general rule, every Act has a short title, a long title and preamble. The Short Title is specified in the Act and is used for convenience. This is the name by which the Act is known (and includes the year in which it was passed). The short title appears on the front page, but there is also a section within the Act (usually either the first or the last section) which specifies what the short title is. The Long Title sets out the subject, scope and purpose of the Act. This appears on the first page after the contents page, immediately before s 1 of the Act. The long title begins 'An Act ...' and explains briefly the Act's content. Some long titles are quite detailed and informative but others are brief and convey little. It is important because it can be used in Court to interpret the Act. The Preamble appears immediately after the Long Title, and states the reason for passing the Act. It may include a recital of the mischief to which the Act is directed and tends to be more comprehensive than a long title (Francis Bennion on *Statutory Interpretation* (2nd Ed, 1992) at p 499.

[16] The long title and preamble to Act 316 reads:

> An Act to provide for the preventive detention of persons associated with any activity relating to or involving the trafficking in dangerous drugs.
>
> [15 June 1985, P.U. (B) 305/1985]
>
> Whereas action which is prejudicial to public order in Malaysia has been taken and further similar action is being threatened *by a substantial body of persons* both inside and outside Malaysia; (Emphasis added.)
>
> And Whereas Parliament considers it necessary to stop such action;
>
> Now, Therefore, Pursuant to *Article 149* of the Constitution *BE IT ENACTED* by the Seri Paduka Baginda Yang di-Pertuan Agong with the advice and consent of the Dewan Negara and Dewan Rakyat in Parliament assembled, and by the authority of the same, as follows:

[17] It is clear from the long title and preamble that Act 316 was enacted pursuant to cl (1) of art 149 of the FC which is as follows:

> 149 Legislation against subversion, action prejudicial to public order, etc.
>
> (1) If an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation —
>
> (a) to cause, or to cause a substantial number of citizens to fear, organized violence against persons or property; or
>
> (b) to excite disaffection against the Yang di-Pertuan Agong or any Government in the Federation; or
>
> (c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or
>
> (d) to procure alteration, otherwise than by lawful means, of anything by law established; or

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(e) which is prejudicial to the maintenance of the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof: or

(f) which is prejudicial to public order in, or the security of, the Federation or any part thereof,

B

any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Article 5, 9, 10 or 13, or would apart from this Article be outside the legislative power of parliament; and Article 79 shall not apply to a Bill for such an Act or any amendment to such a Bill.

C

[18] Paragraphs (e) and (f) were added into cl (1) pursuant to the Constitutional Amendment Act 1978 (Act 442); the effect of which was to introduce a totally different aspect and even purposes from the original provision (see AJ Harding, *Law, Government and the Constitution in Malaysia* (1996) 209). Therefore, the ambit of art 149 has been enlarged to deal with, not just with subversion, but with any social problem, notably drug-trafficking, by use of special powers transgressing the fundamental-rights provisions of the FC.

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E

[19] Accordingly, Act 316 is a special *specie* of enactment on preventive detention under which the fundamental liberties prescribed under art 5 (Liberty of the person), 9 (Prohibition of banishment and freedom of movement), 10 (Freedom of speech, assembly and associations) and 13 (Right to property) may be circumscribed.

F

[20] In this context, one can appreciate the scheme of Act 316 in general, and of the power of preventive detention under sub-s 6(1) in particular. Subsection 6(1) is as follows:

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6 Power to order detention and restriction of persons

(1) Whenever the Minister, after considering —

(a) the complete report of investigation submitted under subsection 3(3); and

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(b) the report of the Inquiry Officer submitted under subsection 5(4), is satisfied with respect to any person that such person has been or is associated with any activity relating to or involving trafficking in dangerous drugs, the Minister may, if he is satisfied that it is necessary in the interest of public order that such person be detained, by order (hereinafter referred to as a 'detention order') direct that such person be detained for a period not exceeding two years.

I

PREVENTIVE DETENTION LAWS

[21] What is preventive detention? Preventive detention has been variously described as: (a) an imprisonment that is putatively justified for non-punitive purposes, most often to prevent criminal acts, (b) the imprisonment of a person with the aim of preventing him from committing further offences or of maintaining public order; and (c) the holding of someone in jail or in an institution because he or she is regarded as a danger to the community. The singular feature of preventive detention is that the detenu is subject to detention without trial on the assumption that his release would not be in the best interest of society — specifically, that he would be likely to commit additional crimes if he was released.

[22] Preventive detention can also be described as the exercise of the powers of Executive detention. Executive detention is detention at the instance of the Executive for an indefinite period without charge and without trial. It is typically imposed as a result of an administrative decision, taken in private, by government officials. Executive detention is designed to be employed in advance — as a preventive measure. Therefore, a detenu is detained not for what he has done, but for what he might do in the future if he remained at liberty.

[23] That the liberty of the person is a fundamental constitutional right cannot be overstated. The same can arguably be said for the fundamental rights provided under arts 9, 10 and 13 of the FC.

[24] However, the fact that the State can assume exceptional powers to restrict the freedom of its citizens is sanctioned under the FC. A perusal of arts 5, 9, 10 and 13 of the FC shows that the rights in question are qualified and not absolute. The art 5 right to life and liberty is qualified in that it may be restricted 'in accordance with law' (see cl (1) of art 5). The same qualifying words are applied for the restriction on the right to property (see cl (1) of art 13). Article 9 on the right to freedom of movement and art 10 on the right to freedom of speech, assembly and association are also qualified as Parliament may by law impose restrictions on such rights (see cl (3) of art 9 and cl (2)(a)–(c) of art 10).

[25] In this connection, art 149 of the FC permits derogation from arts 5, 9, 10 and 13 of the FC in respect of legislation 'against subversion, action prejudicial to public order, etc'. Therefore, art 149 is a special provision under the FC as it authorises Parliament to enact laws which circumscribe the fundamental rights under arts 5, 9, 10 and 13.

[26] Given that the arts 5, 9, 10 and 13 rights are fundamental, it is not unexpected for art 149 and enactments restricting these fundamental rights to come under critical scrutiny. Article 149 has been described as a provision which '... gives great powers of government to Parliament when Parliament chooses to exercise those powers. Parliament's Act must 'recite' that action has been taken or threatened. The actions or threats which could give rise to such appears as broad as language could provide for'. (See Sheridan & Groves, *The Constitution of Malaysia* (Malayan Law Journal, 5th Ed, 2004) at p 594). Learned author Andrew Harding noted that whilst art 149 of the FC allows art 5, as well as other fundamental rights provisions, to be overridden, '[o]ne of the difficulties with legislation as broad in substantive scope as it is narrow in procedural protection is that there is potentially no limit to the types of cases that can be regarded as coming under it' (see Andrew Harding, *The Constitution of Malaysia, A Contextual Analysis* (Hart Publishing, 2012) at pp 172, 176); see also Abdul Aziz Bari, *Malaysian Constitution, A Critical Introduction* (The Other Press, 203) at pp 192–197). According to another learned author Professor Shad Saleem Faruqi, a parliamentary law under art 149 is permitted to violate only four fundamental rights — arts 5, 9, 10 and 13. The clear intention of the FC is that art 149 can prevail over arts 5, 9, 10 and 13 only; that art 149 cannot override fundamental liberties on arts 6, 7, 8, 11 and 12 (see Shad Saleem Faruqi, *Document of Destiny, The Constitution of the Federation of Malaysia* (Star Publications, 2008) at pp 661–2).

[27] It must, however, be appreciated that the guaranteed right to personal liberty is not freedom from executive detention as described in para [22] above, but to freedom from executive detention not authorised by law. It is the lack of legal authorisation which is the subject of prohibition. What is important is that the existence of such powers and its exercise must be clearly prescribed under the law.

[28] Therefore, whilst art 149 authorises the abridgement of fundamental rights, there are two built-in constitutional safeguards provided by cl (1) of art 151:

> 151 Restrictions on preventive detention
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> (1) Where any law or ordinance made or promulgated in pursuance of this part provides for preventive detention —
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> (a) the authority on whose order any person is detained under that law or ordinance shall, as soon as may be, inform him of the grounds for his detention and, subject to Clause (3), the allegations of fact on which the order is based, and shall give him the opportunity of making representations against the order as soon as may be;
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> (b) no citizen shall continue to be detained under that law or ordinance unless an advisory board constituted as mentioned in Clause (2) has

considered any representations made by him under paragraph (a) and made recommendations thereon to the Yang di-Pertuan Agong within three months of receiving such representations, or within such longer period as the Yang di- Pertuan Agong may allow.

(2) ...

(3) ...

[29] The first safeguard confers on the detenu the right: (a) to be informed of the grounds for his detention and the allegations of fact, on which the detention order is based, and (b) to be given an opportunity of making representations against the detention order to an advisory board. The second safeguard relates to a detenu's rights against continued detention without an advisory board having considered his representations and made recommendations on them to the Yang di-Pertuan Agong.

[30] Insofar the first constitutional safeguard is concerned, the right of the detenu to be informed of the grounds for his detention and the allegations of fact on which the detention order is made is provided under sub-s 9(2) of Act 316; the detenu's entitlement to make representations against the detention order to an advisory board is provided under sub-ss 9(1) and (2)(a) of Act 316. The second constitutional safeguard is spelt out in s 10 of Act 316 which provides that after considering the representations, the advisory board shall make recommendations to the Yang di-Pertuan Agong as to whether to continue or lift the detention order.

Interpretation of preventive detention laws

[31] Preventive detention is, therefore, the detention of a person without trial as opposed to punitive detention where a person is detained after a trial in a court of law in which he is proved to have committed an offence punishable under penal law. It is a serious invasion of personal liberty.

[32] One of the functions of the courts is to interpret the law. An inherent part of their function is to see that the Executive acts within the law and does not encroach unnecessarily into the realm of liberty of the subject (see *Re Datuk James Wong Kim Min; Minister of Home Affairs, Malaysia & Ors* [1976] 2 MLJ 245; [1976] MLRA 132 at pp 145–146 (FC)). Whatever safeguards that are provided by law against the improper exercise of such power must be vigorously enforced by the courts. As such, strict compliance with statutory requirements must be observed in depriving a person of his liberty. The material provisions of the law authorising preventive detention must be strictly construed and safeguards which the law provides for the protection of any citizen must be liberally interpreted.

[33] The purpose of art 149 is to enable Parliament, once any one or more of the six categories of action enumerated under paras (a) to (f) of cl (1) has occurred, to make laws providing not only for its suppression but also for preventing its recurrence. Where such an Act of Parliament confers on the Executive to act in a manner inconsistent with arts 5, 9, 10 or 13, the action must be taken bona fide for the purpose of stopping or preventing action of the kind envisaged under the Act (see *Teh Cheng Poh v Public Prosecutor* [1979] 1 MLJ 50 at p 54, (PC)).

[34] Where power is vested in a statutory authority to deprive the liberty of a person on its subjective satisfaction with reference to the specified matters, and if that satisfaction is stated to be based on a number of grounds or for a variety of reasons all taken together, and if some out of them are found to be non-existent or irrelevant, the very exercise of that power is bad. Therefore, strict compliance with the letter of the rule of law is the essence of the matter.

[35] In this instance, the long title to Act 316 declares that: (a) the object of Act 316 is to provide for the preventive detention of persons involved in illicit drug trafficking activities; and (b) Parliament considers it necessary to stop such activities prejudicial to public order which has been taken or is being threatened by a 'substantial body of persons'.

[36] A careful scrutiny of the long title and preamble to Act 316 will lead to two observations. First, the long title had adopted the wordings of cl (1) of art 149 to the effect that 'action has been taken ... and is being threatened by any substantial body of persons'. Second, the long title had also recited the wordings 'which is prejudicial to public order' obtained in para (f) of cl (1) of art 149.

Long title, preamble and schedules

[37] Learned SFC's argument that the long title and preamble is not relevant for the purposes of construing or considering the scope of sub-s 6(1) must be considered in the light of ss 15 and 17A of the Interpretation Acts. Section 15 was amended by the Interpretation (Amendment) Act 1997 (Amending Act). Prior to its amendment, s 15 read as follows:

> Schedules
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> 15. Every schedule (together with any note or table annexed thereto) to an Act or to any subsidiary legislation shall be construed and have effect as part of the Act or subsidiary legislation.

[38] Section 15 was amended to read as follows:

> Long title, preamble and schedules

15. *The long title and preamble and every* schedule (together with any note or table annexed to the schedules) to an Act or to any subsidiary legislation shall be construed and have effect as part of the Act or subsidiary legislation. (Amendments underlined.)

The amendments in s 15 took effect retrospectively on 18 May 1967: see sub-s 3(2) of the Amending Act. Be that as it may, pre-amendment, s 15 only requires every schedule to an Act to be interpreted as part of the Act. The amended s 15 further requires the long title and preamble to be interpreted and have effect as part of the Act.

[39] It is also important to note that concomitant with the amendments to ss 15, 17A was inserted by the Amending Act to emphasise that in construing a provision of an Act, due regard must be had to the purpose or object of the Act. Section 17A which came into force on 25 July 1997 reads as follows:

17A Regard to be had to the purpose of Act

In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object. (Underlined added.)

[40] The declared purpose of the Interpretation Acts as manifested in the long title to the Act was for the application, construction, interpretation and operation of written laws. Read in this light, s 17A underscores Parliament's intention that the interpretation and construction of any written law shall have regard to the underlying purpose or object of the Act. And s 15 as amended further emphasises the point by stating that the long title and preamble and every schedule shall be construed and have effect as part of the Act. That in our view is the codification of purposive rule of construction, which is not merely confined to the provision of a section of the Act, but also includes the purpose or object manifest in the long title and preamble of the Act.

[41] The words 'purpose or object underlying the Act' bear particular significance in the interpretation of preventive laws promulgated pursuant to art 149 of the FC. The purpose of art 149 of the FC is clear. It affirms the validity of legislation enacted against subversion, action prejudicial to public order, etc. notwithstanding that such legislation may be at variance with the fundamental liberties contained in arts 5, 9, 10 or 13 of the FC.

[42] Act 316 is one such legislation. Act 316's underlying purpose is self-evident in its long title and preamble: (a) the preventive detention of persons involved in illicit drug trafficking activities; and (b) to stop action which has been taken or is being threatened by a substantial body of persons which is prejudicial to public order.

[43] It is settled law that whilst the material provisions of preventive detention laws must be strictly construed, safeguards which the law provides for the protection of any person must be liberally interpreted. By reason of the foregoing, careful consideration must therefore be given to the scheme of sub-s 6(1) both under the FC and Act 316.

[44] What is meant by the phrase 'a substantial body of persons'? The word 'substantial' has been defined by the *Oxford Advanced Learner's Dictionary* (5th Ed) as 'large in amount or value; considerable'; 'considerable' is defined as 'great in number or size'. 'Body' is defined as 'a group of people working or acting as a unit (see *Oxford Advanced Learner's Dictionary* (5th Ed)) or as '[a] number of individuals spoken of collectively, usually associated for a common purpose, joined in a certain cause or united by some common tie' (see *Words, Phrases & Maxims — Legally & Judicially Defined* Vol 2 Anandan Krishnan, LexisNexis 2008). The word 'person' refers to a human being as an individual or a human being, especially not identified (see *Oxford Advanced Learner's Dictionary* (5th Ed)). In the light of the foregoing, we think that the phrase 'a substantial body of persons' refer to a large number of individuals acting in concert or working together for a common purpose. In the context of Act 316, we think that it refers to action which is prejudicial to public order which has been taken or is being threatened by a large number of individuals acting together in the trafficking in dangerous drugs.

[45] Notably, sub-s 6(1) refers to two factors: (a) authorises the Minister to exercise his power to make a detention order if he is satisfied that such person is involved in illicit drug trafficking activities and that; and (b) it is necessary in the interest of public order to make the detention order. What is significant is the omission to refer to the involvement of 'a substantial body of persons' in relation to the public order element; which scope is clearly stated in the preamble as 'action which is prejudicial to public order … has been taken … by a substantial body of persons …'.

[46] In the light of ss 15 and 17A of the Interpretation Acts, we are of the view that the purpose and object of Act 316 should be read into sub-s 6(1) in order to give it the meaning intended by Parliament when it enacted Act 316 under the authority of art 149 of the FC. This is particularly important as art 149 which provides for special powers against subversion, etc gave justification for substantial restrictions on fundamental liberties even under normal circumstances (ie, to say, other than during an Emergency). We say so for two reasons. To construe sub-s 6(1) without reading into it the purpose of the Act would be: (a) to render the declared purpose and object which is spelt out in the Long Title and Preamble as mere verbiage; and (b) to render otiose the provisions of ss 15 and 17 of the Interpretation Acts.

[47] For the foregoing reasons, we think that the respondent's argument that the Long Title and Preamble is not relevant for the purposes of interpreting sub-s 6(1) is incongruous. It is clear that the power under sub-s 6(1) may only be exercised if the following three key ingredients are set out in the grounds of the detention order and allegations of fact. One, that the activity which has been taken or is being threatened by a substantial body of persons relates to or involves the trafficking in dangerous drugs. Two, that the detenu is a member of a substantial body of persons. Three, that the Minister is satisfied that it is necessary in the interest of public order that the detenu be subject to preventive detention.

[48] It also goes without saying that the courts must be vigilant in individual cases to ensure that the Executive acts within the law and does not encroach unnecessarily into the fundamental liberties of the person. We have scrutinised the grounds of the detention order, the allegations of fact and the Deputy Minister's affidavit. We agree with counsel for the appellant that the only allegation is that the appellant is acting alone. There is no allegation that the appellant's activities were being carried out in association with or involved a substantial body of persons.

[49] The authorities cited by SFC, *Tan Boon Liat* and *Johnson Tan Ham Seng*, were decided before the amendment to s 15 of the Interpretation Acts. As such, we do not think that they are still applicable insofar as they relate to the construction of the long title and preamble to an Act. In *Ahmad Yani* [2005], Heliliah J (as she then was) held that the recital or preamble to the Internal Security Act 1960 (ISA) provides merely a guide as to the object of the ISA; NS Bindra's, *Interpretation of Statutes* (8th Ed, 1997) was cited in support. We have two points to make. One, NS Bindra's book was published before s 15 of the Interpretation Acts was amended; as such the opinion of the learned author must be qualified by the amended s 15. Second, although *Ahmad Yani* was decided after the Amending Act, the amended s 15 was not considered by the learned judge; had she done so, more probably than not, that she would have decided otherwise. For these reasons, *Ahmad Yani* is distinguishable and overruled. *Yuneswaran* concerns the interpretation of sub-s 9(1) of the Peaceful Assembly Act 2012 ('the PAA'). In that case the Court of Appeal adopted the purposive approach pursuant to s 17A of the Interpretation Acts. It departed from the earlier decision in *Nik Nazmi bin Nik Ahmad v Public Prosecutor* [2014] 4 MLJ 157; [2014] 4 CLJ 944 CA which held that sub-s 9(5) of the PAA was unconstitutional. As in *Ahmad Yani*, the Court of Appeal in *Yuneswaran* did not apply s 15 of the Interpretation Acts; neither did the Court of Appeal construe and give effect to the long title and preamble as part of the PAA. In the circumstances, *Yuneswaran* is distinguishable and of no aid to the respondent's argument.

[50] We are, therefore, constrained to hold that the fact of the appellant acting alone cannot be deemed to fall within the ambit and scope of scrutiny under Act 316; which scope is explicitly confined to a substantial body of persons. The omission in setting out all the three vital ingredients indicates that the mind of the Deputy Minister was really not applied to the question of the preventive detention of the appellant in this case. There was a failure to comply strictly with the letter of the rule of law. Consequently, the exercise of power by the Deputy Minister in the circumstances of this case is bad in law.

[51] For the foregoing reasons, we hold that the detention order is ultra vires art 149 of the FC and Act 316. It follows that the detention order is a nullity and is hereby set aside. A writ of habeas corpus is hereby issued and the appellant is set at liberty forthwith.

Detention order set aside.

Reported by Ashok Kumar